

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
v.	:	
	:	
HERBERT VEDERMAN	:	NO. 15-346-2
KAREN NICHOLAS	:	NO. 15-346-4

MEMORANDUM

Bartle, J.

October 5, 2015

The Government in this criminal action has moved for a hearing regarding possible conflicts of interest of counsel for defendants Herbert Vederman and Karen Nicholas. As requested, the court held a hearing at which time it engaged in a colloquy on the subject with these defendants and with their counsel.

The Government, on July 29, 2015, handed down an indictment against five individuals: Chaka Fattah, Sr., the Congressman representing the Second Congressional District of Pennsylvania; Herbert Vederman; Robert Brand; Karen Nicholas; and Bonnie Bowser. The 29-count, 85-page indictment charges all defendants in Count 1 with conspiracy to commit racketeering in violation of 18 U.S.C. § 1962(d). The alleged purpose of the criminal enterprise included the following:

- a. Furthering and supporting the political and financial interests of [Fattah] and his coconspirators through fraudulent and corrupt means; [and]

b. Promoting [Fattah]'s political and financial goals through deception by concealing and protecting the activities of the Enterprise from detection and prosecution by law enforcement officials and the federal judiciary, as well as from exposure by the news media, through means that included the falsification of documents and obstruction of justice.

The remaining counts charge one or more defendants with: conspiracy to commit wire fraud (18 U.S.C. §§ 1343 and 1349); conspiracy to commit honest services wire fraud (18 U.S.C. §§ 1343, 1346, and 1349); conspiracy to commit mail fraud (18 U.S.C. § 1341 and 1349); mail fraud (18 U.S.C. § 1341); falsification of records (18 U.S.C. §§ 1519 and 2); conspiracy to commit bribery (18 U.S.C. § 371); bribery (18 U.S.C. § 201(b)(1)); bank fraud (18 U.S.C. §§ 1344 and 2); false statements to financial institutions (18 U.S.C. §§ 1014 and 2); money laundering (18 U.S.C. §§ 1957 and 2); money laundering conspiracy (18 U.S.C. § 1956(b)); and wire fraud (18 U.S.C. § 1343).

The indictment asserts, among other allegations, that Fattah, through a complicated scheme, committed fraud to repay a \$600,000 debt from his failed 2007 campaign for mayor of Philadelphia. The scheme purportedly included diversion of federal grant money for this illegal purpose. He is alleged to have used mayoral and Congressional campaign funds to pay off

the college debt of his son. In addition, Fattah is accused of accepting a bribe.

Vederman is charged with RICO conspiracy, conspiracy to commit bribery, bribery, bank fraud, false statements to a bank, falsification of records, money laundering, and money laundering conspiracy. According to the indictment, Vederman was the finance chairman of Fattah's mayoral campaign. While Fattah and others were using campaign funds to help Fattah's son, Vederman was persuading certain creditors of the campaign to forgive money owed due to insufficient funds. The indictment also asserts that Vederman bribed Fattah by providing him with money and other things of value in exchange for official acts by Fattah to benefit Vederman. Some of the money paid by Vederman helped Fattah and his wife qualify for a mortgage on a vacation home.

The charges against Nicholas, a former member of Fattah's staff, are RICO conspiracy, conspiracy to commit wire fraud, wire fraud, money laundering, and falsification of records. The Government asserts that she defrauded the National Oceanic and Atmospheric Administration ("NOAA") of \$50,000 in grant funds paid to Educational Advancement Alliance ("EAA"), a non-profit organization, which Fattah had founded and which she headed as its Chief Executive Officer. The funds were intended to support a Fattah-founded Conference on Higher Education.

Instead, Nicholas purportedly used EAA as a conduit for receipt of federal funds to help repay Fattah's campaign debt. She also allegedly pocketed some of the funds to cover her personal expenses and falsified EAA records. Except as is set forth in the RICO conspiracy charge, Vederman and Nicholas are not named in the same counts of the indictment.

At some point, the office of the United States Attorney for the Eastern District of Pennsylvania, as well as other federal agencies, began to look into the activities of EAA. Catherine M. Recker was retained as counsel to represent EAA and Nicholas around July 15, 2008. Ms. Recker assisted Nicholas in responding to Government subpoenas and accompanied her to a meeting with investigators. While her representation of EAA ended in late 2009, her representation of Nicholas continued until early 2012, that is until almost a year and a half before the indictment in this case was returned. Since approximately April 1, 2013, Ms. Recker and her law partner, Robert E. Welsh, Jr. have been counsel for Vederman.

The Government further maintains that Nicholas paid her current attorney, Ann Campbell Flannery, a fee of \$10,000 in early July 2013 from the \$50,000 grant EAA received from NOAA. The check was drawn on EAA's account. Ms. Flannery's representation of Nicholas commenced shortly before, on June 27, 2013. The Government, we emphasize, does not allege that Ms.

Flannery knew the original source of the funds paid to her or that she has done anything wrong. Nonetheless, the Government asserts that as a recipient of money from an allegedly tainted source, she is a potential witness at the trial.

The Sixth Amendment declares: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. Const. amend. VI. When a defendant retains a lawyer, he or she has the right to retain the lawyer of his or her own choosing. United States v. Gonzalez-Lopez, 548 U.S. 140, 144 (2006). This right, however, is not without its limitations where, for example, counsel has a conflict of interest because of prior representation of a codefendant. See id. at 151-52. Such a conflict can adversely affect both the defendant and codefendant, interfere with the lawyer's duties under the relevant code of professional conduct, and undermine the fairness and integrity of any trial. See id.

In any analysis, we start with the presumption that a defendant has a constitutional right to hire the lawyer whom he or she chooses and who agrees to the representation.¹ See Wheat v. United States, 486 U.S. 153, 159 (1988). Where a potential

1. A defendant has no right to insist on a particular lawyer when the court is making the appointment because of the defendant's inability to afford legal representation. Gonzalez-Lopez, 548 U.S. at 151-52.

conflict affecting codefendants is called to the court's attention, the court should hold a hearing and determine if such a conflict exists. If so, the court will have to decide whether the codefendants knowingly and voluntarily agree to waive the conflict. United States v. Dolan, 570 F.2d 1177, 1181 (3d Cir. 1978). Since defendants are not usually learned in the law, the court must first describe, to the extent it is able, the perils that are lurking when a lawyer has a conflict or potential conflict. The court must be sure the defendants understand the issues and give the defendants an opportunity to ask the court to explain further. Id. Only after a detailed colloquy will the court rule on whether any waiver of the conflict is knowing and voluntary. Id.

Even if defendants knowingly and voluntarily waive any conflicts, the waivers do not, by themselves, resolve the matter. The court must also consider, and may enforce, the provisions of the applicable code of professional conduct and particularly the need to protect the candor in communication between an attorney and client and to foster respect for the court. See United States v. Stewart, 185 F.3d 112, 122 (3d Cir. 1999). In this regard, we focus on several relevant Pennsylvania Rules of Professional Conduct. Rule 1.9(a) provides:

A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent.

Rule 3.7(a) states:

A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case; or
- (3) disqualification of the lawyer would work substantial hardship on the client.

Thus, in deciding this matter before it, the court must always be mindful of the importance of a defendant's constitutional right to hire his or her own counsel. Nonetheless, the court has an independent duty to determine whether any conflict or potential conflict exists and whether it is serious enough to outweigh that constitutional right and any knowing and voluntary waiver. In the end, the integrity of the judicial process and the fairness of any trial must always be paramount. In balancing all these factors, the district court is given "wide latitude" in resolving whether a lawyer may

continue to represent a client at trial. Gonzalez-Lopez, 548 U.S. at 152.

The court engaged in an extensive colloquy with the defendants and their counsel about any conflicts of interest. Without invading the attorney-client privilege, the court probed counsel about their current and prior representations. The court explained separately to Vederman and Nicholas that Ms. Recker and Mr. Welsh may have learned information about them during Ms. Recker's prior representation of Nicholas. Both defendants were put on notice of the possible adverse consequences to each if Ms. Recker and Mr. Welsh continue to represent Vederman after having represented Nicholas. If a conflict or potential conflict exists, a lawyer may not be able effectively to assist a client or may inadvertently use information gained in confidence from a former client, to the former client's detriment. Finally, the defendants were given an opportunity to ask questions of the court, to consult with another lawyer, and to take more time to make a decision.

Vederman and Nicholas, both of whom are well educated, thereafter waived any potential conflict and stated they wanted their current lawyers to remain. The court finds that their waivers were knowing and voluntary.

The court then inquired of Ms. Flannery and Nicholas concerning the fee Ms. Flannery received in July 2013 from

Nicholas drawn from funds the Government alleges EAA obtained as a grant for educational purposes. Nicholas was apprised of the possibility that Ms. Flannery could be a witness on her behalf but would likely be precluded from doing so by Rule 3.7(a) of the Pennsylvania Code of Professional Conduct. Nicholas was offered a chance to ask questions, to obtain the advice of a second attorney, and to take additional time to consider the issue. Nicholas waived any potential conflict and reiterated her desire to have Ms. Flannery continue to be her lawyer. The court finds this waiver to be knowing and voluntary.

Finally, the court finds no institutional concerns which would prevent the court from accepting the waivers. The integrity of the judicial process, the fairness of the trial, and the need to uphold the ethical rules for attorneys are not implicated.

As a result of the court's inquiry at the hearing, it does not appear that any privileged or other confidential information Ms. Recker obtained from Nicholas has any relevance to any factual or legal issues in this case. Significantly, Ms. Recker learned nothing about Vederman. A year then elapsed between the end of the representation of Nicholas and the beginning of the representation of Vederman. From what the court can ascertain, the interests of Vederman and Nicholas are not adverse to one another in this action and the interests of

Vederman in this action and the interests of Nicholas in the prior matter are not adverse to each other. The Government, we note, does not argue to the contrary. Moreover, Ms. Flannery's acceptance of the fee from Nicholas will not adversely affect her ability to defend her client since, as the Government and the defendant now agree, it is not anticipated that she will be a witness.

In coming to the result we do, we have taken into account not only the testimony of Vederman and Nicholas but also the affidavits and in-court statements of defense counsel. These members of the bar are individuals of impeccable reputation in the legal community. They have advised the court that, in their view, no conflicts or potential conflicts exist.

In sum, defendants Vederman and Nicholas have knowingly and voluntarily waived any conflicts or potential conflicts of interest, which in any event, appear to be non-existent. Furthermore, the integrity of the judicial process, the fairness of the trial, and the rules of professional conduct will not be undermined by the continued representation of Herbert Vederman by Ms. Recker and Mr. Welsh, and the continued representation of Karen Nicholas by Ms. Flannery.

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ORDER

AND NOW, this 5th day of October, 2015, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that Catherine M. Recker, Esquire, and Robert E. Welsh, Jr., Esquire, may continue to represent defendant Herbert Vederman in this action and that Ann Campbell Flannery, Esquire, may continue to represent defendant Karen Nicholas in this action.

BY THE COURT:

/s/ Harvey Bartle III

J.